85-245

No.

Supreme Court, U.S.
FILED
AUG 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

JEROME C. UTZ,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding, contrary to decisions of this Court that petitioner could be tried under an indictment not returned by the Grand Jury?

2. Did the Court of Appeals err in holding, contrary to rulings of this Court, that petitioner could be tried on charges that were not made in the indictment against him?

3. Did the Court of Appeals err in holding that the trial court could order the Government, without the consent of petitioner, to prepare an "altered" indictment, removing from the original indictment forty-seven (47) offenses, or did this constitute a forbidden amendment and physical alteration of the indictment in violation of the Fifth Amendment Guarantee to be tried only on an indictment returned by the Grand Jury?

4. Did the Court of Appeals err in holding, contrary to rulings of this Court, the Third Circuit, Fourth Circuit, Fifth Circuit, Eighth Circuit, and Eleventh Circuit, that the continuous admission into evidence of out-of-court statements of coconspirator David Wellington, who was not present at trial and was not shown to be "unavailable" to testify, did not violate the Sixth Amendment's Confrontation Clause?

5. Did the Court of Appeals err in refusing to decide, contrary to rulings of this Court, whether coconspirator David Wellington's out-of-court statements inculpating petitioner violated petitioner's Sixth Amendment right of cross-examination?

6. Because of manpower shortages or other compelling forces, did the Court of Appeals in rendering its decision misstate the facts of the case on which it based its legal decision and in so doing depart drastically from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

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JEROME C. UTZ,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Jerome C. Utz respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on March 4, 1985 and corrected on March 28, 1985.[1]

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 754 F.2d 1457. The corrected opinion of the Court of Appeals is printed in Appendix A.

JURISDICTION

The opinion of the Court of Appeals was entered on March 4, 1985 (Appx. A). The order correcting the title of the case is

[1] The only party not named in the title of this petition is Mark Wellington whose name appears in the title of Appx. A.

printed in Appendix B and the order denying rehearing and rehearing en banc is printed in Appendix C. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1). This petition is timely filed.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves (Appendix D):

1. The Fifth Amendment, United States Constitution

2. The Sixth Amendment, United States Constitution.

3. Title 28 U.S.C. Section 1783.

4. The United States of America Extradition Treaty with the United Mexican States.

5. Federal Rules of Criminal Procedure, Federal Rule 7(d).

6. Federal Rules of Evidence 801(d)(2)(E).

7. The statutes under which petitioner was prosecuted, though nothing turns on their terms, were 18 U.S.C. Sections 1341 and 2314.

STATEMENT OF THE CASE

Preliminary Statement

This case presents a number of important Constitutional issues regarding the nature of relief that may be sought by a defendant when he is held to answer on an indictment not returned by the Grand Jury and the error committed when out-of-court statements of a coconspirator, identified as a Federal Protected Witness, are introduced into evidence without a showing of "unavailablility" having been made by the Government.

A. Statement of the Facts

1. *The physically altered indictment—created by court order:* Prior to and during the trial, petitioner made numerous Motions

to Strike Surplusage under Fed. R. Crim. P. (7)(d). They were all substantially denied. (ER 35)[2]

At the close of the Government's case, petitioner made a Motion for Judgment of Acquittal under Rule 29, Rules of Criminal Procedure. Petitioner argued that the Government had failed to prove the scheme alleged in the indictment (ER 41). In response, the Government admitted that over forty-seven (47) allegations were unproven. At that point, the trial court, sua sponte, ordered the Government to type up a new indictment, deleting from the original indictment the unproven allegations. Neither the Government nor petitioner agreed or stipulated that an altered indictment should be prepared (RT Vol. 17, pages 2793-2937, Vol. 18, page 2943), (Appx. A.).

It was on this new altered indictment, not returned by the grand jury that petitioner was then held to answer and it was this new altered indictment that was submitted to the trial jury (Appx. A).

2. *Charges introduced at trial that were not contained in the indictment*:

a. State Officials from the State of Washington were permitted to testify that petitioner gave them false information so that David Wellington and his son could be given new identities. (RT Vol. 11, pages 2008-2014).

b. Officials from the State of California were permitted to testify that petitioner misused his office in the Attorney General's Office in his alleged dealings with David Wellington (RT Vol. 11, pages 1895-1917, Vol. 13, pages 2269-2275, 2307-2317).

c. Testimony was introduced that petitioner had dictated a letter for a U.S. Marshal assigned to the Federal Sensitive Witness Program to sign and that petitioner gave the U.S. Marshal false information concerning David Wellington's income average over a period of time so that Wellington could get a credit line approved. (RT. Vol. 27, pages 4326-4331).

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[2] "ER" refers to the Excerpt of Record in the court below and "RT" refers to the Reporter's Transcript filed with the court below.

d. A T.V. producer was permitted to testify that petitioner and U.S. Marshall Van Court (who was David Wellington's parole agent) tried to negotiate a movie or a T.V. production with her about the Federal Sensitive Witness Program (RT Vol. 12 pages 2049-2083).

e. Evidence was introduced that petitioner personally purchased two airplanes with investor funds. (RT Vol. 9, pages 1576-1600).

f. Evidence was introduced that petitioner was given a Mercedez automobile by David Wellington (RT 9, pages 1564-1574, RT 3, pages 535-536).

g. Evidence was introduced that petitioner gave false information to persons concerning David Wellington's criminal background.

h. Evidence was introduced that petitioner assisted David Wellington in obtaining clearance from Federal Authorities to engage in house construction (Appx. A).

i. Evidence was introduced that petitioner attempted to purchase real property in Orinda, California and elsewhere with investor funds (RT Vol. 10, pages 1821-1846).

j. Evidence was introduced that petitioner gave false information to a United States District Court Judge in Trenton, New Jersey concerning David Wellington so that David Wellington would be sentenced to time served and not placed on supervised parole. (RT Vol. 11, pages 1943-1958).

3. *Coconspirator David Wellington—unavailability:* On July 8, 1983, petitioner filed a Motion to Exclude coconspirator statements on the grounds that their admission would violate petitioners Sixth Amendment right to confront and cross-examine witnesses. This motion was directed specifically at out-of-court statements made by coconspirator David Wellington, that the Government was attempting to introduce without proving necessity or unavailability. (ER 39). The motion was denied without a hearing and numerous out-of-court statements made by David Wellington were then introduced into evidence to prove the truth of the matters asserted, over a "standing objection". The hearsay

statements started in 1976 and continued through 1978 (RT Vol. 8, pages !477-78, RT Vol. 1, page 87, RT Vol. 2, pages 237-8, RT Vol. 3, pages 436-37, 505-506, 535-536, 567-70, RT Vol. 4, pages 707, Vol. 6, pages 1190-91, RT Vol. 7, pages 1261, Vol. 8, pages 1407-11. RT Vol. 9, pages 1631-38, RT Vol. 10, pages 1744, 54, 55, RT Vol. 11, pages 1947-50, RT Vol. 12, pages 2099, 100, RT Vol. 14, pages 2443-44, RT Vol. 16, pages 2722-24, RT Vol. 16, pages 2730-41, 58, and an illegally obtained tape recording that was read to the jury (exhibit Newman 1).

4. *Out of Court inculpating statements made by coconspirator David Wellington:*

Larry Newman, an investor testified:

"Q. What did David Wellington say about Jerome Utz?

A. Well this was prior to my investing and I was in the car with David Wellington and we were going around with some people who were interested in investing up there. And as we were driving through Cameron Park, we stopped in front of a house that David Wellington pointed out and he said, "That house there we built for an associate of mine by the name of Jerry Utz. Have you ever heard that name? Of course, I had but the other people in the car had not. And he said he was an assistant attorney general for the State of California." Vol. 16-2729-2730.

David White was allowed to testify as follows:

"You've mentioned that one of the airplanes used by the concerns up there was owned by Mission Vectors. Was Mission Vectors. if you know—

Mr. Hinckley: Objection, your honor, First of all, there's no foundation. I think the witness testified that he knew one of the planes up there was owned by Jerry Utz, But—

The court: Sustained.

Mr. Hoffman: I believe his testimony was Mission Vectors also, your honor.

The Court: Do you recall, was your testimony that it was owned by Utz?

The witness: It was owned by Utz and Mission Vectors, Mission Vectors was the credit card for paying all bills, for gas and things."

The Court: Okay.

Mr. Hoffman: Q. Did you ever have any discussions with David Wellington about Jerry Utz?

A. Yes.

Q. Did you ever have any discussions with David Wellington about Jerry Utz with regard to the Project up there?

A. Well, Jerry was--Yes, I did?

Q. Do you recall any specific conversations that you had with Mr. Wellington concerning Mr. Utz?

Mr. Hinckley: Your honor, I review the objection we made before several times. We have had an *ongoing objection* that this is all hearsay and it's being offered, I'm sure, for the truth of the statement, even though it comes from Mr. Wellington's mouth.

The court: Okay.

Mr. Hoffman: Q. I believe the question was: Do you remember a specific conversation that you had with Mr. (David) Wellington concerning Jerry Utz?

A. I remember several conversations that I had with David concerning Jerry.

Q. Well, can you direct your attention to any one of those conversations?

A. Well, If I can do a narrative? On a number of occasions we had discussed the fact that Jerry was a good friend an *advisor to David.* David would ask him from time to time for advice. It comes to mind specifically he referred to Jerry as a "*valuable friend.*"

Q. When did that conversation occur?

A. *When he told me that they bought—That they had bought Jerry a car.*" (Rt 3-535-536).

Finally, Myers was permitted to testify over objection that David Wellington told him that Mission Vectors was, "An entity for the purpose of investment for Mr. Wellington, Mr. David Wellington and Mr. Jerome Utz to own things in." And that Mission Vectors was involved with the operation of the building program up at Cameron Park because of "an airplane" that he believed was owned by that entity, Mission Vectors. (Vol 1-131-132).

B. Jurisdiction of the District Court and Court of Appeals

Jurisdiction of the District Court is predicated upon the provisions of 18 United States Code, Section 3231. Jurisdiction of the Court of Appeals is based upon the provisions of 28 United States Code, Section 1291.

C. The Proceedings Below

On June 3, 1982, one day before the Statute of Limitations ran, a federal grand jury returned an eleven count indictment against petitioner and others charging him with nine counts of mail fraud in violation of 18 U.S.C. Section 1341 and two counts of interstate transportation in violation of 18 U.S.C. Section 2314 and U.S.C. Section 2, Aiding and Abetting. (ER 1). An altered indictment was prepared during the trial and sent to the jury (ER 2) (Appx. A). Thereafter, a verdict of guilty was returned against petitioner on nine counts.

The Court of Appeals for the Ninth Circuit, in a published opinion, affirmed the conviction on the issues raised by this petition.

On June 21, 1985, the Court of Appeals denied a Petition for Rehearing and Suggestion for Rehearing en banc (Appx. C).

REASONS FOR GRANTING CERTIORARI

This case presents important questions regarding the interpretation and application of the Fifth and Sixth Amendments to the Constitution. The Court of Appeals has decided federal questions

in a way in conflict with the applicable decisions of this Court and other Courts of Appeals.

This is a case where petitioner was held to answer on an indictment not returned by the grand jury. This issue was raised in petitioner's opening brief. On April 1, 1985, this Court decided *United States v. Miller,* 471 U.S. , 85 L. Ed.2d 99, 105 S. Ct. . Seven days later, petitioner filed an Appellant's Supplemental Petition for Rehearing to advise the Ninth Circuit of the *Miller* case. The motion to file was denied (Appendix E).

The decision of the Ninth Circuit requires reversal because of its novel holding that the trial court can order the preparation of a new and altered indictment where the Government admits that various allegations (47) were unproven. In *United States v. Miller,* supra, this Court reaffirmed the "settled rule" in *Ex parte Bain,* 121 U.S. 1 (1887) that "an indictment may not be amended (physically altered) except by resubmission to the grand jury unless the change is merely a matter of form."

In *United States v. Miller,* at 107 this Court also reaffirmed *Stirone v. United States,* 361 U.S. 212 (1960) for the proposition that it is "fatal error" when a defendant is "convicted on a charge the grand jury never made against him". As demonstrated, hereinabove, numerous charges against petitioner were made during the trial that were not contained in the indictment.

The decision of the Ninth Circuit also cries out for review because of its holding concerning the out-of-court statements made by David Wellington, a coconspirator who the government did not attempt to produce at trial because of the prosecution's erroneous legal logic that a showing of "unavailability" was not required under the Coconspirator Rule.

Prior to and during trial, petitioner continually objected to the introduction of these statements (ER 39). Although the trial judge had nothing more than the representations of government counsel that David Wellington, who was an admitted "Federal Protected Sensitive Witness", was in a jail in Mexico awaiting a preliminary hearing, it held that any statement David Wellington made could be introduced into evidence under Fed.R.Evid. 801(d)(2)(E). Inconsistently, the trial judge also held in his

order, "[F]or the purposes of the Confrontation Clause's rule of necessity, David Wellington's imprisonment in Mexico is insufficient to demonstrate his unavailability and thereby satisfy the Sixth Amendment's strictures." (Appendix G, page 2).

Only this Court can put to rest the uncertainties created by the opinion of the Ninth Circuit, which has placed itself in direct conflict with other cases on point in this rapidly developing area of the law where the government is excused from producing or even trying to produce coconspirators who may or may not be in Canada or Mexico, Foreign Countries where the United States has Existing Extradition Treaties (Appendix D—The United States Treaty with Mexico).

I

IN HOLDING THAT PETITIONER COULD BE TRIED ON AN INDICTMENT NOT RETURNED BY THE GRAND JURY, THE NINTH CIRCUIT HAS DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH AMENDMENT AND PUT ITSELF IN DIRECT CONFLICT WITH THIS COURT

The Ninth Circuit has held that a defendant may be tried on an indictment not returned by the grand jury. The court reached this startling result through sheer legal legerdemain.

According to the court, the original indictment returned by the grand jury charged the defendants with a wide range of unlawful acts. After the Government admitted that various allegations were unproven, the original indictment was retyped with the unproven allegations omitted. The District Court submitted the "altered" indictment to the jury. The Ninth Circuit held that petitioner waived his right to challenge the physical alteration of the indictment because of an alleged "filed" surplusage motion under Fed.R.Crim.P. 7(d) (Appendix D). The Excerpt of Record in the court below conclusively demonstrates that no Rule 7(d) motion was on file at the time the government "confessed" that they had not proven over forty-seven allegations in the original indictment (ER39). The simple fact, supported by the record hereinbelow, is that before any Rule 7(d) oral motion could be

made at the close of the government's case, the prosecutor stopped all discussions and admitted (or "confessed" as the trial court characterized the admissions), that they had not proven substantial portions of the indictment. After describing each allegation not proven, the court, sua sponte, ordered that a new "altered" indictment be typed up by the government. (Appendix A). This altered indictment was prepared without the approval or stipulation of either the prosecution or petitioner. Subsequently, petitioner made a motion to strike other allegations but this motion did not include the "confessed" allegations admitted by the Government. This can be illustrated by the following understanding:

"Mr. Zalkind: Your honor, for the record, going back to the Court's rulings just made, it's our understanding that those were as to defense motions, and that your honor affirmed or ruled that the affirmative items that had been offered by the government would, of course, also be included in that which was stricken; is that right?

The Court: Oh, these are the *confessed ones*; and, of course, the ones conceded by the government had been stricken, too. Thank you for clarifying that, Mr. Zalkind." (RT Vol 18, page 2943).

In upholding the trial court's actions, the Ninth Circuit lost sight of a basic principle of jurisprudence; it created a "waiver" where none exists and deprived petitioner of his right to be tried only on an indictment returned by the grand jury.

The precise question concerning physical alteration of an indictment was answered most recently by this Court in *United States v. Miller*, supra at page 108 as follows;

"(I)n *Bain* the trial court sustained Bain's demurrer to the indictment. After sustaining the demurrer, however, the court granted a motion by the Government 'that the indictment be amended by striking out the words *'the Comptroller of the Currency and.'*" 121 U.S., at 5. Bain was then required to plead to the amended indictment, and was tried and convicted under that indictment."

In footnote No. 6, this Court explained: "(H)ow can it be said that, with these words stricken out, it is the indictment which was found by the grand jury?" *Miller*, supra at 108.

Even, arguendo, if petitioner had made a Rule 7(d) motion, that would not be an express waiver of petitioner's rights under the Fifth amendment to be tried only on an indictment returned by the grand jury. In order to waive a constitutional right at trial, there must be a deliberate design, or a strategic trial choice to forego the federal constitutional claim, *Ledbetter v. Warden*, 4 Cir., 368 F.2d 490 (1966), cert. denied 386 U.S. 971. It certainly cannot be argued that petitioner or his counsel deliberately allowed the altered indictment to be prepared as a deliberate design or strategic trial choice. Its preparation and the continuance of the trial was vigorously objected to on the grounds that petitioner's Fifth Amendment rights had been violated and that he was entitled to an acquittal under the *Bain* decision and Rule 29.

It is important to note at this time, that the forty-seven allegations deleted from the original indictment could not have been deleted under the provisions of Rule 7(d) since Rule 7(d) only contemplates the removal of immaterial or irrelevant allegations as to form—not substance.

Finally, Rule 7(d) may not operate as a waiver of rights under the Fifth Amendment. In *Heisler v. United States*, 394 F.2d 692 (9th Cir 1968) the court held in pertinent part as follows:

"(A)n indictment cannot be amended in any substantial way, *even with the defendant's consent*.... The draftsmen of the Federal Rules of Criminal Procedure... made no provision for amendment because the ruling in *Bain* rests upon constitutional requirements." Id. at 695 (Emphasis added).

As this Court held in *Bain* and reaffirmed in *United States v. Miller*, at page 109-10, It is "(T)he settled rule in federal courts that an indictment may not be (physically) amended except by resubmission to the grand jury, unless the change is merely a matter of form."

II

IN HOLDING THAT THE VARIANCE BETWEEN THE INDICTMENT AND EVIDENCE WHICH REVEALED MULTIPLE SCHEMES AND ACTS IN UNRELATED CONSPIRACIES, WAS CURED BY THE GIVING OF A SINGLE SCHEME JURY INSTRUCTION, THE NINTH CIRCUIT HAS DESTROYED PETITIONER'S SUBSTANTIAL RIGHT TO BE TRIED ONLY ON CHARGES PRESENTED IN AN INDICTMENT RETURNED BY THE GRAND JURY AND IS IN CONFLICT WITH OTHER COURTS OF APPEAL AND THIS COURT

Petitioner argued during trial and in his opening brief that there was a variance between the indictment and proof at trial. Petitioner cited to the Ninth Circuit the numerous charges set forth hereinabove in the Statement of the Case, that were added at trial thereby "broadening" the possible basis for conviction. Petitioner was able to demonstrate to the Ninth Circuit that he was in fact found guilty of an offense proved at trial that was not contained in the indictment (ER 43). In its decision, however, the Ninth Circuit circumvented the constitutional error in two footnotes 3 and 4 on pages 8 and 9 (Appx. A), holding that the error was cured by the giving of a "single scheme" jury instruction.

This precise question before the Ninth Circuit has been faced recently by this Court—and this Court has reached a conclusion diametrically opposed to that of the Ninth Circuit. In *United States v. Miller,* supra at pages 106 and 107 this Court held in pertinent part:

"(I)n *Stirone* the offense proved at trial was *not* fully contained in the indictment, for trial evidence had 'amended' the indictment by *broadening* the possible bases for conviction from that which appeared in the indictment.

"(A)s the *Stirone* Court said, the issue was 'whether (Stirone) was convicted of an offense *not charged in the indictment*' " 361 U.S. at 213 (emphasis by court).

Each of the additional charges that are set out in the Statement of the Case "broadened" the bases for conviction and were in fact,

themselves, the bases for separate criminal penalties thereby activating the double jeopardy violation. Because of this, we present to this Court a fundamental question for review, i.e., can a conviction which is admittedly based in part on charges not contained in the indictment be allowed to stand. This Court has always held in the negative, and we think it important that this Court reiterate this principle by applying their holding in *United States v. Miller,* supra at page 107 where it held in pertinent part as follows:

> "Because the conviction might have been based on the evidence of obstructed steel exports, an element of an offense not alleged in the indictment, a unanimous Court held that the indictment had been unconstitutionally 'broadened.'
>
> 'The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment. Here . . . we cannot know whether the grand jury would have included in its indictment a charge that commerce in steel from a nonexistent steel mill had been interfered with. Yet because of the court's admission of evidence and under its charge this might have been the basis upon which the trial jury convicted petitioner. If so, he was convicted on a charge the grand jury never made against him. This was fatal error.' 361 U.S., at 218-219.

The Court contrasted Stirone's case with cases like *Ford v. United States.* See 361 U.S., at 217. As we discussed in Part II, *supra,* in *Ford* the Court had refused to invalidate a conviction because of variances between the indictment and the narrower trial proof. The *Stirone* Court declared that, unlike that sort of variance, 'the addition charging interference with steel exports [in *Stirone* was] neither trivial useless, nor innocuous. While there was a variance in the sense of a variation between pleading and proof, that variation [had in *Stirone*] destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error.' *Ibid.* (citations omit-

ted). Accord *Russell v. United States*, 369 U.S., at 770-771 (following *Stirone*)."

As in *Stirone*, the case at bench illustrates a deprivation of such a basic right that was far too serious for the Ninth Circuit to treat it as harmless error and opinionate that a "single scheme" jury instruction could cure the "fatal error" that actually existed throughout the trial.

III

IN HOLDING THAT THE ESSENTIAL SCHEME ALLEGED IN THE INDICTMENT REMAINED UNALTERED, ALTHOUGH FORTY-SEVEN ALLEGATIONS HAD BEEN DELETED, THE NINTH CIRCUIT HAS SANCTIONED AN UNCONSTITUTIONAL AMENDMENT AND PUTS ITSELF IN CONFLICT WITH THIS COURT

A comparison of the two indictments clearly demonstrates that petitioner was found guilty of fraudulent scheme Y—not fraudulent scheme X, as alleged in the original indictment (ER 1, 2). Each schemer count 1 through 10 (which were incorporated into each of the substantive courts) had eliminations because, admittingly, no evidence was introduced by the prosecution. With reference to the schemer counts that accused petitioner, thirteen (13) alleged victims were deleted from Count 2. Count 8 was eliminated altogether. Counts 9(a) (b) and (c) were eliminated. Counts 10(a)(b)(c)(e)(f)(g)(h)(i) and (j) were eliminated. With these major and substantial changes including the elimination of schemer count 8 in its entirety, all of schemer Count 9 except (d) and all of schemer count 10 except (d), the altered indictment did not charge the same scheme as the original indictment. In fact all of the serious charges that the grand jury had made against petitioner were unproved and deleted. How can we say that the grand jury would have returned this new altered indictment with these substantial changes?

In *United States v. Miller*, at pages 110, 111 this Court held:

> "(A)n indictment is amended when it is so altered as to charge a different offense from that found by the grand jury. *Ex parte Bain*, 121 US 1 (30 L Ed 849, 7 S Ct 781).... In *Salinger v. United States*, supra 548-549, we explicitly held that where an indictment charges several offenses, or the commission of one offense in several ways, the withdrawal from the jury's consideration of *one* offense or *one* alleged method of committing it does not constitute "a forbidden amendment of the indictment.... (W)ere the rule otherwise the common practice of withdrawing from the jury's consideration *one* count of an indictment while submitting others for verdict, sustained in *Dealy v. United States*, 152 U.S. 539, 542, would be a fatal error." (Emphasis added).

This Court therefore holds that *"ONE"* offense or *"ONE"* alleged method of committing it does not consitute a forbidden amendment of the indictment, if the original indictment returned by the grand jury is submitted to the trial jury. This Court does not hold nor has it ever held that forty-seven allegations can be deleted with no constitutional error. This petition should be granted in order to clarify the requirements for physically altering an indictment that substantially changes the scheme previously charged by the grand jury.

IV

IN HOLDING THAT COCONSPIRATOR DAVID WELLINGTON'S OUT-OF-COURT STATEMENTS COULD BE INTRODUCED INTO EVIDENCE WITHOUT A SHOWING OF "UNAVAILABILITY," THE NINTH CIRCUIT HAS IGNORED PETITIONER'S SIXTH AMENDMENT RIGHTS TO CONFRONT AND CROSS-EXAMINE WITNESSES AND HAS PUT ITSELF IN CONFLICT WITH OTHER COURTS OF APPEALS AND THIS COURT

The government's case against petitioner featured the well orchestrated testimony of numerous witnesses concerning statements that were made to them by coconspirator David Welling-

ton. They included David Wellington's statements that, "He (David Wellington) had involvement with the government and that he was a special type of witness for the government and that he was basically under protective custody." (RT Vol 1, page 142, lines 23-25); that he was building houses in Placerville, not making much money, having a lot of fun, and Assistant Attorney General Murtague should come out and try it (RT Vol 11, page 1947), that investors would own their lots outright, that he, David Wellington would procure a construction loan for them (RT Vol 7, page 1261), that the construction would be completed within one year (RT Vol 9, page 1631, RT Vol 10, page 1744), that he was working with the California Attorney General's Office and the person to contact was petitioner (RT Vol 11, page 1951), details concerning the setting up of escrows with Title Insurance companies for building-stage-cash disbursements to David Wellington (RT 12, page 2099), the introduction of a tape recording admittedly obtained illegally wherein David Wellington discussed the operation of Cano Construction Company in detail (RT Vol 15. page 2521-2522, (Exhibit Newman 1), that specific lots in Cameron Park were owned by David Wellington and that some specific homes there had been built by Cano Construction (RT Vol 16, pages 2720-22), that lots would be transferred free and clear (RT Vol 16, page 2726), that one of the houses, "we built for an associate of mine by the name of Jerry Utz (petitioner) (RT Vol 16, pages 2729), that "Jerry (petitioner) was a good friend and advisor to David Wellington, that David Wellington would ask petitioner from time to time for advice, that petitioner was David Wellington's valuable friend." (RT Vol 3 page 536), that "(T)hey (David Wellington and Cano) had bought Jerry (petitioner) a car" (RT Vol 3, page 536); and that an airplane used to fly potential investors to Cameron Park was owned by Jerry Utz and Mission Vectors.

The above coconspirator statements were offered to prove the truth of the matters asserted under Fed.R.Evid.(801)(d)(2)(E) and were objected to at every stage of the proceedings and on appeal to the Ninth Circuit (ER30, RT Vol 1, page 72-80, RT Vol 3, page 447, RT Vol 2, page 194-196, RT Vol 3, page 535, RT Vol 17, page 2794-5,2824). Petitioner argued that, "(T)hat the government must show the declarant to be unavailable. Up to now

David Wellington's unavailability has simply been assumed due to his presence in Mexico. This assumption, while possibly reasonable is an insufficient showing of necessity. See, *Barber v. Page*, 390 U.S. 720 (1968). The ultimate question is whether the witness is unavailable despite good faith efforts undertaken prior to trial to locate and present that witness. As with other evidentiary proponents, the prosecution bears the burden of establishing this predicate. *Roberts* at 75." (ER 39 page 3 of Motion to Exclude Coconspirator Statements).

Prior to the decision of the Ninth Circuit, courts had consistently—and sensibly—held that the mere assertion by the prosecution that the out-of-court declarant was in another jurisdiction or that he was under indictment in another case, is inadequate and the government has in fact failed to carry its burden of showing that the declarant was "unavailable" to testify.

The only assertion that the government offered in opposition to petitioner's Motion to Exclude was the oral argument by the prosecution that David Wellington was in Mexico and that the government did not have to show "unavailability" under Fed.R.Evid. 801(d)(2)(E).

We would open a new chapter indeed in the history of our adversary system were we to permit the proponent of evidence to lay a constitutionally required foundation by such ipse dixit.

In 1980, this Court in *Ohio v. Roberts*, 448 U.S. 74, 100 S. Ct. at 2543 held: "(I)f there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation."

In reaching its decision on David Wellington's statements, the Court of Appeals circumvented *Ohio v. Roberts*, although the exact issue had been raised at trial and on appeal. In a complete departure from any legal argument submitted by either side, the Ninth Circuit held that only "one" out-of-court statement by David Wellington was admitted for the truth of the matter asserted." (Appx. A, page 11). This erroneous decision (1) ignored the "unavailability" requirement imposed by the Confrontation Clause with respect to coconspirator statements (2) failed to address the glaring *Bruton*, infra, error that was pointed

out to them and (3) ignored the actual facts of the case as described hereinabove.

This Court has steered a "middle course" between the Sixth Amendment's Confrontation Clause and the hearsay rule and recognizes that the Confrontation Clause imposes requirements separate from, and sometimes more stringent than, the hearsay rule and its many exceptions. One of the absolute requirements still remains the demonstration of "unavailability" by competent evidence or testimony under oath.

The most recent update in the long line of cases from other circuits is found in *United States v. Caputo*, (3rd Circuit) 758 F.2d 944 (1985). In *Caputo* the out-of-court statements by the coconspirator referred to the defendant as a "partner" with whom business transactions were discussed. In the instant case, petitioner was referred to as "an associate (partner), a "good friend", "an advisor", a "valuable friend", someone for whom they "had built a house for", someone whom they had bought a car for", and with whom they discussed the construction and financial program with. All these statements were attributed to David Wellington.

In *Caputo v. United States*, the court held in pertinent part:

> "The sixth amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .' U.S. Const. amend. VI. The Confrontation Clause recognizes that the 'opportunity to cross-examine an accuser or a critical witness is a powerful tool in the search for truth and in the assessment of guilt or innocence.' *Gibbs*, 739 F.2d at 854 (Rosenn, J., dissenting). This fundamental right, which is secured by nearly all of our state constitutions as well as the federal Constitution.
>
> Viewed in this light, the sixth amendment's Confrontation Clause can be seen to 'stem from the same roots' as the evidentiary rule excluding hearsay. *Dutton v. Evans*, 400 U.S. 74, 86 91 S.Ct. 210, 218, 27 L.Ed.2d 213 (1970) (footnote omitted). *See also* Fed.R.Evid. art. VIII introductory note ('Emphasis on the basis of the hearsay rule today tends to center upon the condition of cross-examination.').

The Confrontation Clause has not however, been 'construed to bar all use of out-of-court statements as evidence of criminal guilt.' *United States v. Inadi*, 748 F.2d 812, 818 (3d Cir.1984). Nor has it been equated with the hearsay rule and its traditional exceptions. *Dutton v. Evans*, 400 U.S. at 86, 91 S.Ct. at 218. Rather the Supreme Court has steered 'a middle course,' *Ohio v. Roberts*, 448 U.S. 56, 68 n. 9, 100 S.Ct. 2531, 2539-40 n. 9, 65 L.Ed.2d 597 (1980), that recognizes that the Confrontation Clause 'imposes requirements separate from, and sometimes more stringent than, the hearsay rule and its many exceptions,' *Inadi*, 748 F.2d at 818. Specifically, the Supreme Court has held that the Confrontation Clause 'operates in two separate ways to restrict the range of admissible hearsay': '[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia or reliablility.' *Ohio v. Roberts*, 448 U.S. at 65-66, 100 S.Ct. at 2538-39.

Most jurisdictions have traditionally recognized an exception to the hearsay rule for the out-of-court statements of a party's coconspirators. Under the Federal Rules of Evidence an out-of-court statement that is 'offered against a party and is . . . a statement by a conconspirator of a party during the course and in furtherance of the conspiracy' is classified as an 'admission' and excluded from the definition of hearsay.[3] (footnote omitted) Fed.R.Evid. 801(d)(2)(E). The mere fact that the drafters of the Federal Rules opted to make coconspirator statements an exception to the definition of hearsay, rather than an exception to the rule excluding hearsay, Fed.R.Evid. 802, is of no consequence in applying the Confrontation Clause. *See United States v. Massa*, 740 F.2d 629, 639 (8th Cir.1984). *See also Ammar*, 714 F.2d at 256 ('We cannot . . . abdicate our responsibility to preserve constitutional values to the rule writers, whether federal or state.'). Nor does the drafters' reason for according coconspirator statements this special status as party admissions—'that each conspirator is an agent of the other and that the statements of one can therefore be attributable to

all.' *Ammar,* 714 F.2d at 255-56—justify any departure from the requirements of *Roberts.* We have previously said that the rationale is a 'legal fiction'. *Ammar,* 714 F.2d at 255 and that the most plausible justification for the coconspirator exception in most cases is 'the difficulty of proving conspiracy and related offenses.' *Inadi,* 748 F.2d at 819. *See also* Mueller, *The Federal Coconspirator Exception: Action, Assertion, and Hearsay.* 12 Hofstra L.Rev. 323, 335 (1984). We are reminded of Justice Holmes' aphorism that '[t]he Constitution is not to be satisfied with a fiction.' *Hyde v. United States,* 225 U.S. 347, 390, 32 S.Ct. 793, 811, 56 L.Ed. 1114 (1912)(dissent). Because coconspirator admissions lack the 'special trustworthiness' that characterizes most admissible hearsay, we refused in *Ammar,* 714 F.2d at 255-56, to carve out an exception to the *Roberts* 'reliability' requirement. And because the admissibility of such evidence is justified largely as a matter of necessity, we held in *Inadi,* 748 F.2d at 819, that the *Roberts* requirement that the government must demonstrate the unavailability of a declarant who is not produced for in-court confrontation is appropriate in the context of coconspirator admissisons.[4] (footnote omitted) In holding the *Roberts* 'unavailability' and 'reliability' requirements fully applicable to the admissions of coconspirators who do not testify in court, we are joined by the other Courts of Appeals that have decided this question. *See United States v. Lisotto,* 722 F.2d 85, 88 (4th Cir.1983), *cert. denied,* ____ U.S. ____, 104 S.Ct. 1682, 80 L.Ed.2d 157 (1984); *United States v. Peacock,* 654 F.2d 339, 349 (5th Cir.1981), *cert. denied,* ____ U.S. ____, 104 S.Ct. 404, 78 L.Ed.2d 344 (1983; *United States v. Massa,* 740 F.2d 629, 639 (8th Cir. 1984); *United States v. Ordonez,* 737 F.2d 793, 802 (9th Cir. 1984); *United States v. Tille,* 729 F.2d 615, 620-21 (9th Cir.), *cert. denied,*____ U.S. ____, 105 S.Ct. 164, 83 L.Ed.2d 100 (1984). *See also United States v. Georgia Waste Systems,* 731 F.2d 1580, 1582 (11th Cir.1984).

Here . . . the trial judge had nothing more than the representations of government counsel that Di Pasquale would have taken the fifth. In *Inadi* we held that the government's

> assertions, on appeal, that a coconspirator-declarant would probably have taken the fifth did not establish unavailability. We believe that *Inadi* controls the result in this case. We would open a new chapter indeed in the history of our adversary system were we to permit the proponent of evidence to lay a constitutionally required foundation by such *ipse dixit*. Moreover, as we stated in *Inadi*, 748 F.2d at 820, '[u]nlike defendants, witnesses have no blanket right to stand mute.' Thus, even if the trial judge could have been reasonably certain that DiPasquale—who had already pleaded guilty to the charges contained in this indictment—would have *asserted* his first amendment privilege, there was clearly not sufficient evidence in the record for the trial judge to determine that the assertion would have been proper and that an exemption from testifying would have been appropriate. '[I]f there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation.' *Ohio v. Roberts*, 448 U.S. at 74, 100 S.Ct. at 2543".

In the instant case, the government's mere assertion that their "Federal Protected Sensitive Witness" was in Mexico does not satisfy the requirements of the Sixth Amendment's Confrontation Clause. As petitioner pointed out to the Court of Appeals during oral argument, there were at least two legal vehicles available to the government. These were 28 U.S.C. Section 1783, pertinent portions of which are printed in Appendix D and the Extradition Treaty with the United Mexician States, pertinent portions of which are printed in Appendix D.

It is important to note at this time that the trial court in its opinion on this subject, admitted that, "David Wellington's imprisonment in Mexico is *insufficient* to demonstrate his unavailability and thereby satisfy the Sixth Amendment's strictures." (ER 39—Order page 2 lines 10-14). In error the court permitted the introduction of the statements, anyway, under Fed.R. Evid.(801)(d)(2)(E).

Only this Court can put to rest the uncertainties created by the opinion of the Ninth Circuit, which has placed itself in direct

conflict with other cases on point in this rapidly developing area of the law.

V

IN REFUSING TO DECIDE WHETHER COCONSPIRATOR DAVID WELLINGTON'S OUT-OF-COURT STATEMENTS INCULPATING PETITIONER VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT OF CROSS-EXAMINATION, THE NINTH CIRCUIT HAS PUT ITSELF IN DIRECT CONFLICT WITH ALL MAJORITY OPINONS OF THS COURT AND ALL OTHER COURTS OF APPEALS

In *Bruton v. United States*, 391 U.S. 123 (1968), Justice Brennan, expressing the view of this Court held that since codefendant Evans did not testify, the introduction of his statements inculpating the other codefendant added substantial weight to the government's case in a form not subject to cross-examination, thereby violating Bruton's Sixth Amendment right of cross-examination. Many of the statements made by David Wellington inculpated petitioner. As demonstrated hereinabove, these included statements by investors that David Wellington told them that petitioner was an associate (partner), an advisor, a valuable friend, and one whom he asked advice of and discussed the operation with at Cameron Park. In addition, David Wellington told investors that he had built a house for petitioner, that he had given petitioner an automobile, and that they both owned an airplane that was used to fly investors to the building sites.

This issue was raised during trial and in the Court of Appeals. By not deciding the issue, the Ninth Circuit has departed from the mandate of the Confrontation Clause as interpreted by *Bruton*, supra. This Court should grant review to decide the issue, the facts of which are clearly described hereinabove.

VI

THE NINTH CIRCUIT IN RENDERING ITS DECISION MISSTATED THE FACTS OF THE CASE ON WHICH IT BASED ITS LEGAL DECISION AND IN SO DOING DEPARTED DRASTICALLY FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

When one compares the facts stated in the opinion of the Ninth Circuit with the Statement of the Case hereinabove, one would think that they are two separate cases. Such is not the case. It is very difficult to pierce the presumptive shield of a court opinion and point out to a reviewing court the fact that the lower court did misstate the facts which was the basis for their legal opinion. Petitioner believes that he has been able to do exactly that in this case. These errors were brought to the attention of the Ninth Circuit in our Petition for Rehearing. The Ninth Circuit chose to ignore the errors either because of lack of manpower or for other compelling reasons. The Due Process Clause of the Fifth Amendment is applicable in a case such as this. The concept of equal justice under law in served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment. When the actions of a specific federal court is involved and there is no special national interest,[3] the Due Process Clause has been construed as having the same significance as the Equal Protection Clause. See *Hampton v. Mow Sun Wong,* 426 U.S. 88 (1976) and *Bolling v. Sharpe,* 347 U.S. 497 (1971).[4]

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[3] The Government does not assert that their refusal to attempt to produce their "Federal Protected Sensitive Witness" David Wellington as a witness involved "National Security".

[4] This equal protection aspect of the Due Process Clause of the Fifth Amendment also applies to petitioner's arguments in Sections I, II, and III hereinabove. In petitioner's case the trial judge ordered that a new altered indictment be created. In other cases the trial court either instructs the jury to disregard the deleted allegations by jury instructions or sends the original indictment to the jury without any explanation

This is the Court of Last Resort. Only this Court can require the Ninth Circuit to correctly state the facts in this case. The law applied turns on the facts. Review, therefore, should be granted.

CONCLUSION

For the reasons stated above, the Petition for Certiorari should be granted.

Dated: August 5, 1985.

Respectfully submitted,

JEROME C. UTZ
Counsel Pro Se

(such as in *Miller*, supra). There is clear discrimination in petitioners case since the jury does not have the knowledge that many allegations contained in the original indictment were not proven. Petitioner therefore has a greater burden than defendants in the other two examples. Only this Court can set a standard to be applied by all courts under its jurisdiction.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARK WELLINGTON,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JEROME C. UTZ,
Defendant-Appellant.

Nos. 83-1307,
83-1311
D.C. No. CR-82-629
TEH

CORRECTED
OPINION

Argued and Submitted January 18, 1985

Filed March 4, 1985

Corrected March 28, 1985

Appeal from the United States District Court
for the Northern District of California
The Honorable Ray McNichols, Senior District Judge,
Presiding

SUMMARY

Defendants were indicted by a grand jury and later convicted on counts of mail fraud and violating the Travel Act. The indictment arose in connection with a fraudulent land sale scheme. Defendants appealed claiming numerous errors at trial.

[1] The Court rejected defendants' claim that the deletion of certain allegations in the indictment violated their fifth amend-

ment right to be indicted by a grand jury. The altered indictment did not charge defendants with any new crime or additional unlawful acts. It charged them with the same essential fraudulent scheme as the original indictment. [2] The Court also affirmed jury instructions regarding multiple schemes to defraud, aiding and abetting, and the refusal to give an instruction as to one of the defendant's status as a federal protected witness.

Defendants' evidentiary challenges were also rejected. [3] Only one of the admitted statements constituted hearsay. In light of other overwhelming evidence, any error was harmless. [4] The admission of prior convictions was not error because they were not admitted to impeach a witness, but rather to prove knowledge of one defendant's criminal past. [5] The district court's refusal to exclude the prior convictions based on Rule 403 was not an abuse of discretion. Similarly, the court did not abuse its discretion by refusing to sever the trials of the codefendants.

[6] Defendant Utz's seventy-six day delay in going to trial did not violate the Speedy Trial Act, 18 U.S.C. § 3161(c)(1). [7] Defendants may not invoke the statutory remedies of the Jury System Improvement Act of 1978, 28 U.S.C. §§ 1861-1877, because they failed to file a sworn statement required by the Act. [8] A questionnaire sent out by the district court to prospective jurors did not amount to an unconstitutional delegation of judicial power to the court clerk, nor did it violate defendants' sixth amendment rights. [9] Other miscellaneous assignments of error were rejected by the Court.

Affirmed.

COUNSEL

Cristopher J. Cannon, San Francisco, California, for defendant-appellant Wellington; Jerome Utz, Pro Per, Orinda, California, for defendant-appellant Utz.

E. Leslie Hoffman, Washington, D.C., for the plaintiff-appellee.

OPINION

Before: MERRILL, FARRIS and BEEZER, Circuit Judges.

BEEZER, Circuit Judge:

Along with two other defendants, Mark Wellington and Jerome Utz were indicted for eleven counts of mail fraud and violations of the Travel Act relating to a fraudulent land sales scheme. After a lengthy trial, a jury convicted Wellington and Utz on nine counts. We affirm.

I

Background

This case involves allegations of fraud arising out of a land sales operation in Placerville, California. The scheme was masterminded by David Pedley, who had four previous convictions on charges related to his involvement in fraudulent schemes. Following a stock fraud conviction in the mid-1970's, Pedley acted as an informer for several federal law enforcement agencies. Pedley was placed in the federal witness protection program. While in that program, he met Jerome Utz, who was a deputy attorney general for the state of California. Utz assisted Pedley and his son in obtaining a legal name change from "Pedley" to "Wellington." Utz also assisted David Wellington in obtaining clearance from federal authorities to engage in house construction. Wellington was joined by his son, Mark Wellington, and a friend, Michael Cano. Utz became a silent partner in the enter-

prise. The record reveals that David Wellington did not act as an informer for the state of California and that Utz's superiors were unaware of the assistance that Utz provided to the Wellingtons.

In 1976, Wellington and his associates recruited a sales force and began to solicit investors for their real estate development. They created Mission Vectors, Inc. ("Mission Vectors"), which owned an airplane that was used to fly potential investors from San Jose to Placerville. On arriving in Placerville, the potential investors were told that the proposed development would proceed in four stages. First, the investors would purchase lots from Pacific Park Properties ("PPP") for $10,000 each. Each lot would be free and clear of liens and encumbrances. Second, the developers would arrange construction loans in the investor's names. Third, Cano Construction Company ("CCC") would use the funds to construct houses on the lots. The investors were given a brochure which stated that CCC had been successfully producing houses since 1974. Fourth, Diamond Pacific Realty ("DPR") would market the completed homes. The investors were told that they would recover their down payments and receive any profits that were realized.

Several of those representations were false. All of the lots were subject to substantial liens, many of which were soon the subject of foreclosure proceedings. PPP did not even own some of the lots. In addition, CCC was created in 1976, rather than 1974. None of the principals had substantial experience in construction.

Several investors either discovered the misrepresentations or grew impatient with the lack of progress in the construction of their houses. To lull those investors into a sense of security, Wellington and his associates made further misrepresentations and promises and placed money into escrow accounts. The money in the escrow accounts was subsequently diverted to other accounts. PPP, CCC, and DPR declared bankruptcy in August 1978.

During the course of the development project, substantial amounts of money borrowed on behalf of the investors were

diverted to other uses. These uses included renting a Mercedes for each of the principals, developing a potential television series about the federal witness protection program, and investing in private ventures.

After a lengthy investigation, a federal grand jury in the Eastern District of California indicted David Wellington, Mark Wellington, Jerome Utz, and Michael Cano on June 3, 1982. The indictment charged the defendants with nine counts of mail fraud and two counts of violating the Travel Act. *See* 18 U.S.C. §§ 1341, 2314. Utz and Cano entered pleas of not guilty. Following his arrest in Mexico, Mark Wellington also pleaded not guilty. During the pendency of this case, David Wellington was imprisoned in Mexico awaiting trial on unrelated charges. David Wellington and Mark Wellington were also charged in a separate indictment with a scheme involving check kiting. The check kiting indictment was pending during the proceedings in this case.

On the motion of the defendants, venue was transferred to the Northern District of California. Judge Thelton Henderson presided over the first seven weeks of the trial. When Judge Henderson became ill, he was replaced by Senior Judge Ray McNichols, who presided over the final two weeks of the trial. On August 29, 1983, the jury convicted Wellington and Utz on nine of the eleven counts. Cano was acquitted on two counts, but the jury deadlocked on the remaining nine counts. The Government subsequently dismissed all charges against Cano. On December 6, 1983, Judge McNichols sentenced Wellington and Utz to three years imprisonment on each count, with the sentences running concurrently. Judge McNichols suspended all but six months of Utz's sentence and sentenced him to three years of probation.

II

The Indictment

The original indictment charged the defendants with a wide range of unlawful acts relating to the fraudulent land sales scheme. At trial, the defendants filed a motion to strike several

unproven allegations as surplusage. After the Government admitted that various allegations were unproven, the district court struck those allegations. The original indictment was retyped with the deleted allegations omitted. The district court ultimately submitted the altered indictment to the jury. The defendants now contend that the Government's failure to prove the deleted allegations caused an amendment of the indictment in violation of their fifth amendment right to be indicted by a grand jury.[1]

[1] Any person charged with a crime that is punishable by death or imprisonment in a penitentiary has a constitutional right to be indicted by a grand jury. U.S. Const. amend V; *see Ex parte Wilson*, 114 U.S. 417, 427 (1885); 1 C. Wright, *Federal Practice and Procedure* § 121 (1982). In *United States v. Pazsint*, we summarized the law as follows:

> After an indictment has been returned, its charges may not be broadened through amendment—whether it be by physical alteration, jury instruction, or bill of particulars—except by the grand jury. Simply correcting an obvious clerical error or eliminating surplusage from the text of the indictment may be harmless error, but

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[1] By filing a motion for the removal of surplusage under Rule 7(d), the defendants did not waive their right to challenge the resulting indictment as charging a new or different crime. All that was waived was their right to challenge the physical alteration of the indictment. The Advisory Committee analyzed Rule 7(d) as follows:

> This rule introduces a means of protecting the defendant against immaterial or irrelevant allegations in an indictment or information, which may, however, be prejudicial. The authority of the court to strike such surplusage is to be limited to doing so on defendant's motion, in light of the rule that the guaranty of indictment by a grand jury implies that an indictment may not be amended. By making such a motion, the defendant would, however, waive his rights in this respect.

Fed. R. Crim. P. 7(d) advisory committee note (citation omitted); *see United States v. Milestone*, 626 F. 2d 264, 269 (3d Cir.), *cert. denied*, 449 U.S. 920 (1980). The defendants' contention that the Government's failure to prove the deleted allegations constituted an amendment is properly before us.

> amending the indictment to charge a new crime through the jury instructions constitutes *per se* reversible error.

703 F.2d 420, 423 (9th Cir. 1983) (citations omitted). It is well settled that "a portion of the indictment that the evidence does not support may be withdrawn from the jury, and this is not an impermissible amendment, provided nothing is thereby added to the indictment, and that the remaining allegations charge an offense." 1 C. Wright, *supra*, § 127, at 422; *see United States v. Dawson*, 516 F.2d 796, 801-02 (9th Cir.), *cert. denied*, 423 U.S. 855 (1975). The defendants claim that the altered indictment charged them with a different offense than the original indictment and that the alteration therefore constituted an amendment. The district court disagreed and denied the defendants' motions for a judgment of acquittal under Rule 29.[2]

It is well settled that the government need not prove every allegation of fraudulent activity in an indictment. *United States v. Gatewood*, 733 F.2d 1390, 1394 (10th Cir.), *cert. denied*, 105 S. Ct. 200 (1984); *United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979). Even after the deletions, the indictment charged the defendants with numerous unlawful acts relating to the fraudulent land sales scheme. The altered indictment did not charge the defendants with a "new crime" or with additional unlawful acts. Instead, the altered indictment charged the defendants with perpetrating the same essential fraudulent scheme that was alleged in the original indictment. *See Salinger v. United States*, 272 U.S. 542, 549 (1926); *Dawson*, 516 F.2d at 804. Accordingly, the district court's denial of the defendants' motions under Rule 29 was proper under the general rules governing the deletion of unproven allegations.

The defendants assert that our recent decision in *United States v. Miller*, 715 F.2d 1360 (9th Cir. 1983), *modified on denial of rehearing*, 728 F.2d 1269 (9th Cir.), *cert. granted*, 105 S. Ct. 78

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[2]The sufficiency of an indictment is reviewable de novo. *United States v. Buckley*, 689 F.2d 893, 897 (9th Cir. 1982), *cert. denied*, 460 U.S. 1086 (1983).

(1984) (No. 83-1750), requires a reversal in this case. We disagree. The defendant in *Miller* was charged with two unlawful acts, one of which the prosecution did not prove. The unproven allegation, a "false burglary," was at least as significant as the proven allegation, an inflated insurance claim. We noted that "there can be no dispute that Miller's conviction was predicated on a substantially narrower scheme than that pleaded in the indictment. . . ." 715 F.2d at 1363. Accordingly, we reversed Miller's conviction. In this case, the defendants' convictions were not "predicated on a substantially narrower scheme than that pleaded in the indictment." While several specific allegations were deleted, the essential scheme alleged in the indictment remained unaltered. We conclude that the district court correctly denied the defendants' motions under Rule 29.[3]

III

Jury Instructions

When reviewing a challenge to the jury instructions, we consider the instructions as a whole. *United States v. Green,* 745 F.2d 1205, 1209 (9th Cir. 1984). The district court must give an instruction relating to any legitimate theory of defense that is supported by evidence. *United States v. Wright,* 593 F.2d 105, 107 (9th Cir. 1979). The district court has broad discretion in formulating the instructions, however, and neither party may demand specific language. *United States v. Marabelles,* 724 F.2d 1374, 1382-83 (9th Cir. 1984); *United States v. James,* 576 F.2d 223, 226 (9th Cir. 1978). Imperfectly formulated jury instructions will serve as a basis for overturning a conviction only upon a showing of abuse of discretion. *Green,* 745 F.2d at 1209.

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[3]The defendants argue that the facts presented at trial reveal the existence of multiple schemes, rather than a single scheme. Accordingly, they contend that their convictions must be reversed because of the variance between the indictment and the evidence. We disagree. As discussed below, the jury was instructed that it could not convict the defendants unless it found a single scheme. We conclude that a rational trier of fact could have found a single scheme. *See United States v. Arriaga-Segura,* 743 F.2d 1434, 1435 (9th Cir. 1984). While it would have been possible for the jury to find multiple schemes, it did not do so. The record does not reveal a fatal variance.

A. *Unified Scheme Instruction*

[2] In *United States v. Mastelotto,* we overturned a mail fraud conviction because the district court failed to instruct the jury that: (1) it must unanimously find the existence of a single scheme to defraud, and (2) the single scheme to defraud must not be substantially different from the scheme charged in the indictment. 717 F.2d 1238, 1249-51 (9th Cir. 1983). The district court in this case instructed the jury as follows:

> The indictment alleges the existence of a scheme to defraud. Each of the jurors must find the defendant guilty of participation in the same single scheme to defraud and that the scheme to defraud in which the defendant is found to have participated is the same scheme as the overall fraudulent scheme alleged in the indictment.

The jury was also instructed that it could not convict a defendant unless the defendant was "a willing and active participant in the particular scheme to defraud alleged in the indictment." These instructions were a full and accurate statement of the law.

The defendants claim, however, that the district court erred by failing to instruct the jury regarding the existence of multiple schemes. The defendants assert that the existence of multiple schemes was a valid theory of defense that required a jury instruction. The jury instruction quoted above, however, covered this theory of defense. If the jury did not find a "single scheme to defraud," it could not have convicted the defendants.[4] In essence, the defendants are objecting to the manner in which the district

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[4]The defendants also claim that the district court's instructions allowed the jury to convict the defendants on the basis of acts by third parties in unrelated conspiracies. In essence, this argument is a restatement of the "multiple schemes" argument. Once again, the jury could not have convicted the defendants if it had found separate "conspiracies." In addition, the jury was required to find that the defendants were willing participants in the overall scheme. This argument is without merit.

court formulated the instruction. Accordingly, this argument is without merit.[5]

B. *Miscellaneous Challenges to Jury Instructions*

The defendants argue that David Wellington's status as a federal protected witness justified a certain amount of misrepresentation and deception to protect him and his family. The district court refused to instruct the jury regarding this defense. The defendants have cited no authority for the proposition that a federal protected witness has the right to violate the mail fraud statute to conceal his or her identity. As a result, we conclude that the proposed instruction was merely an embellishment on the defendants' general theory that their actions were not intended to deceive investors. *See United States v. Ives,* 609 F.2d 930, 934 (9th Cir. 1979), *cert. denied,* 445 U.S. 919 (1980). The jury was fully and properly instructed regarding that theory. Accordingly, the district court did not abuse its discretion by rejecting the proposed instruction.

The defendants also argue that the district court impermissibly enlarged the indictment by instructing the jury as follows: "In all eleven counts the Government alleges that the defendants aided and abetted each other." The defendants argue that this misstated the contents of the indictment. In fact, the indictment *did* allege that the defendants aided and abetted each other. While it is true that the indictment did not charge the defendants with violating the statute governing aiders and abettors, that statute does not create a separate crime. *United States v. Kegler,* 724 F.2d 190, 200-01 (D.C. Cir. 1984). The statute merely provides that aiders and abettors are liable as principals. 18 U.S.C. § 2(a).

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[5]The defendants also contend that the district court violated their right to a jury trial by failing to submit the "multiple schemes" issue to the jury. In support of their argument that the district court failed to submit this issue to the jury, the defendants quote several passages from the jury instructions. We disagree with the defendants' interpretation of the jury instructions. As noted above, the instructions required the jury to find a single scheme to defraud.

Accordingly, the district court's instructions did not enlarge the indictment.[6]

IV

Evidence Relating to David Wellington

A. *Hearsay Statements*

The defendants claim that the district court erred by allowing several witnesses to testify regarding out-of-court statements by David Wellington. The defendants contend that the admission of those statements is reversible under the hearsay rules and the confrontation clause. With only one exception, however, the statements are not hearsay. In order to constitute hearsay, a statement must be "offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c); *see* Wellborn, *The Definition of Hearsay in the Federal Rules of Evidence*, 61 Texas L. Rev. 49 (1982). Most of the alleged hearsay statements are false representations that were made to potential investors. These representations are not hearsay because their probative value is independent of their truth. *United States v. Gibson*, 690 F.2d 697, 700-02 (9th Cir. 1982), *cert. denied*, 460 U.S. 1046 (1983). The remainder of the alleged hearsay statements are incidental comments and instructions to employees, the truth of which was not relevant to any issue at trial.

[3] The record reveals that only one out-of-court statement by David Wellington was admitted for the truth of the matter asserted. Charles White, an employee of CCC, testified that Wel-

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[6]The defendants argue that the district court misstated the elements of mail fraud. The district court's instructions were correct. *See Beecroft*, 608 F.2d at 757. The defendants also argue that the district court's statement to the jury that the indictment states an offense constituted "improper vouching." This argument lacks a legal basis. In any event, the district court instructed the jury that the indictment was not evidence. Finally, the defendants argue that the district court was incorrect when it instructed the jury that a violation of the Travel Act does not require specific intent. The district court was correct. *E.g., United States v. Masters*, 456 F.2d 1060, 1061 (9th Cir., 1972).

lington said that he and Utz were friends and that a car had been purchased for Utz. The fact that Utz and David Wellington were friends is well documented in the record. In fact, Utz described his friendship with David Wellington in great detail on direct examination. Utz does not dispute the existence of the car that was allegedly purchased with CCC's funds, but claims that he paid for the car with rental income from an airplane that he owned. White testified that the airplane was actually purchased by Mission Vectors on behalf of CCC. White's testimony thus supports the proposition that the car was purchased by CCC, rather than Utz, even without the hearsay statement. As a result, the hearsay statements were cumulative. *See United States v. Miranda-Uriarte,* 649 F.2d 1345, 1350 (9th Cir. 1981). In light of the overwhelming evidence of other fraudulent acts by Utz and the minimal probative value of the hearsay statements even when standing alone, we conclude that any error committed by the district court was harmless. *See United States v. Foster,* 711 F.2d 871, 880-81 (9th Cir. 1983), *cert. denied,* 104 S. Ct. 1602 (1984); *United States v. Castillo,* 615 F.2d 878, 883 (9th Cir. 1980).

B. *Prior Convictions and Bad Acts*

[4] At trial, the district court allowed the introduction of evidence regarding David Wellington's past. The evidence included David Wellington's past convictions for various fraudulent schemes, his involvement in the federal witness protection program, and his activities as an informer. Both defendants contend that the admission of this evidence constituted reversible error.

Utz contends that the prior convictions were inadmissible, citing various cases and rules relating to the use of prior convictions to impeach a witness. Those cases and rules are inapplicable because the convictions were not admitted to impeach David Wellington. Instead, the Government introduced the convictions and the circumstances surrounding the convictions to prove that Utz knew of David Wellington's criminal past. The Government alleged that Utz made representations to lenders and potential investors regarding David Wellington's character. If Utz knew that David Wellington had a history of involvement in fraudulent

schemes, those representations were fraudulent.[7] The use of prior convictions for this purpose is proper. *See, e.g., United States v. Wilson,* 536 F.2d 883, 886 (9th Cir.), *cert. denied,* 429 U.S. 982 (1976); *United States v. Jones,* 425 F.2d 1048, 1051-52 (9th Cir.), *cert. denied,* 400 U.S. 823 (1970). Accordingly, the district court did not abuse its discretion by admitting evidence relating to David Wellington's prior convictions.

[5] Mark Wellington contends that the evidence relating to David Wellington's past should have been excluded under Rule 403 because its probative value was substantially outweighed by the danger of unfair prejudice to Mark Wellington. Wellington argues that the father-son relationship between the Wellingtons created a danger that the jury would hold Mark Wellington accountable for his father's actions. Wellington notes that his father's past was only relevant with respect to Utz and argues that a higher standard for admissibility is therefore appropriate. *See United States v. Figueroa,* 618 F.2d 934, 945-46 (2d Cir. 1980).

We review the district court's ruling under Rule 403 for an abuse of discretion. *United States v. Winters,* 729 F.2d 602, 604 (9th Cir. 1984). Wellington's arguments regarding the transference of culpability from father to son are speculative. The district court was in a position to observe the effects of the admission of the evidence, yet concluded that Rule 403 did not require exclusion. *See, e.g., United States v. Longoria,* 624 F.2d 66, 68 (9th Cir.) (noting that a district court's decision to admit a prior conviction over an objection under Rule 403 "should be given great deference"), *cert. denied,* 449 U.S. 858 (1980). In addition, the jury was instructed that David Wellington's past misconduct was only admissible against Utz. The record does not support the conclusion that the district court abused its discretion.

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[7]Contrary to the assertion in Mark Wellington's brief, Utz's knowledge of David Wellington's convictions was a disputed issue. Utz denied such knowledge on cross-examination.

V

Severance

The decision to sever the trials of codefendants rests within the discretion of the district court. *United States v. Gonzales,* 749 F.2d 1329, 1333 (9th Cir. 1984); *see* Fed. R. Crim. P. 14. The test for deciding whether the district court abused its discretion is "whether a joint trial would be so prejudicial that the trial judge could exercise his discretion in only one way." *United States v. Escalante,* 637 F.2d 1197, 1201 (9th Cir.), *cert. denied,* 449 U.S. 856 (1980).

Utz claims that he was unfairly prejudiced by joinder in six ways. First, he notes that he was not named in many of the allegations in the indictment. This fact is irrelevant because he could be convicted solely on the basis of his knowing participation in the scheme. *See, e.g., United States v. Mitchell,* 744 F.2d 701, 704 (9th Cir. 1984).

Second, Utz notes that the Government introduced evidence relating to Mark Wellington's alleged attempt to avoid arrest by fleeing to Mexico. Utz argues that this was unfairly prejudicial to him because the jury was not instructed that Wellington's flight could not be used against Utz. The jury, however, was instructed to consider only the individual defendant's acts or statements in deciding whether that defendant participated in the scheme. The record does not reveal any occasion on which Utz requested a more specific instruction. *See* Fed. R. Crim. P. 30.

Third, Utz claims that the existence of the check kiting indictment hampered his defense because Mark Wellington was named as a defendant in that indictment. The record reveals no instance in which relevant evidence was excluded because of the check kiting indictment.

Fourth, Utz notes that the Wellingtons' bankruptcy petition was still active at the time of trial. The relevance of this fact is

unclear. In any event, Utz never asserted the bankruptcy petition as a ground for severance at trial.

Fifth, Utz notes that David Wellington's prior convictions were introduced against him. Those convictions would have been admissible against Utz even if the district court had severed the cases.

Sixth, Utz notes that an alias used by Mark Wellington in Mexico was introduced at trial. The relevance of this fact is unclear. In any event, the district court did not abuse its discretion by denying a severance on that ground.

In sum, Utz's arguments do not establish an abuse of discretion by the district court.[8]

VI

Sufficiency of Evidence

In determining the sufficiency of the evidence, we consider the evidence in the light most favorable to the Government and determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Arriaga-Segura*, 743 F.2d at 1435. Utz claims that the evidence produced at trial was insufficient. The record reveals, however, that the evidence of Utz's guilt was overwhelming.[9]

Utz raises two arguments in support of his position. First, he claims that the Government produced no evidence showing his involvement in various aspects of the scheme. This fact is irrele-

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[8]Wellington argues that the admission of evidence concerning his father's past was so unfairly prejudicial to his defense that severance was required. For the reasons stated above in our discussion of Wellington's objection under Rule 403, we conclude that the district court did not abuse its discretion by refusing to sever the trials.

[9]The defendants also attempt to impeach the jury's verdict with the affidavit of juror Vance I. Morris, Jr. This is impermissible. Fed. R. Evid. 606(b).

vant. It is only necessary that the defendant be a knowing participant in the scheme. *See Mitchell,* 744 F.2d at 704. The evidence of Utz's participation was overwhelming. Utz was present at the earliest meetings regarding the formation of the real estate venture. A realtor who dealt with David Wellington considered Utz to be a "silent partner" in the enterprise. Most of the Government's witnesses testified to some type of involvement on Utz's part. In sum, the evidence was sufficient to support the conclusion that Utz was a knowing and active participant in the scheme.

Second, Utz claims that the Government failed to show "mailings" within the meaning of 18 U.S.C. § 1341. The Government introduced evidence that the defendants mailed deeds to various investors, that the investors mailed payments to the defendants, and that the defendants mailed letters to the attorneys for some of the investors. All of these mailings were in furtherance of the scheme. *See Green,* 745 F.2d at 1208. Accordingly, the requirements of section 1341 were satisfied.

VII

Speedy Trial Act Claims

18 U.S.C. § 3161(c)(1) states: "In any case in which a plea of not guilty is entered, the trial of a defendant charged in an . . . indictment with the commission of an offense shall commence within seventy days . . . from the [last] date the defendant has appeared before a judicial officer of the court in which such charge is pending . . . ." Section 3161(h) sets forth various types of excludable delay. Section 3161(h)(8) authorizes a continuance based on "the ends of justice," in accordance with specified factors.

[6] Utz claims that seventy-six days had elapsed prior to his appearance on December 6, 1982. The district court rejected this claim. Utz does not claim that the district court applied an incorrect legal standard. Accordingly, we review the district court's findings under the clearly erroneous standard. *United States v. Henderson,* 746 F.2d 619, 622 (9th Cir. 1984). Utz has stated no

reasons for concluding that the findings are clearly erroneous. Instead, we conclude that the district court's findings are amply supported by the record.

Utz also contends that the district court's decision to grant a continuance under section 3161(h)(8) on December 6, 1982, was improper because the district court failed to state its reasons in the record. *See* 18 U.S.C. § 3161(h)(8)(A). The record reveals, however, that the district court specifically found that the case was "complex," which is a proper ground under section 3161(h)(8)(B)(ii). In any event, Utz failed to object in a timely fashion. *See id.* § 3162(a)(2). In sum, Utz's Speedy Trial Act claims are without merit.[10]

VIII

Juror Questionnaire

Prior to voir dire, the district court sent out a questionnaire to prospective jurors. The questionnaire contained two questions relating to the jurors' ability to participate in a lengthy trial. The defendants contend that the use of those questions mandates a reversal.

A. *The Jury System Improvements Act*

Juror selection in federal courts is governed by the Jury System Improvements Act of 1978, 28 U.S.C. §§ 1861-1877. The Act mandates the random selection of jurors. The defendants contend that the questionnaire is contrary to that mandate.

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[10]The defendants also assert their right to a speedy trial under the sixth amendment. The defendants claim that the district court had a duty to sever the cases *sua sponte* when the Government requested a continuance in order to apprehend the absent defendants. The defendants cite *United States v. Didier*, 542 F.2d 1182 (2d Cir. 1976), in which the court reversed the district court's denial of a motion to dismiss the indictment under extreme circumstances. No such circumstances are presented by this case. The district court's decision to grant the continuance was not an abuse of discretion. *See United States v. Mitchell*, 744 F.2d 701, 704 (9th Cir. 1984).

[7] Although the defendant's contention may have merit, they lack a statutory remedy. The remedies provided under the statute are exclusive. *Id.* § 1867(e). In order to obtain those remedies, a defendant must file a timely motion containing "a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title." *Id.* § 1867(d). The defendants failed to file such a statement. Accordingly, the defendants may not invoke the statutory remedies. *United States v. Foxworth*, 599 F.2d 1, 3 (1st Cir. 1979); *United States v. James*, 453 F.2d 27, 29 (9th Cir. 1971).

B. *Constitutional Grounds*

1. *Excessive Delegation*

[8] The defendants contend that the use of the questionnaire constituted an unconstitutional delegation of judicial power to the court clerk. The record, however, does not reveal that the court clerk was given *any* authority to select or to exclude jurors. In fact, the record does not even show that the questions were actually used. Accordingly, we reject the defendant's contention under the facts of this case.[11]

2. *Jury Composition*

The defendants allude to a violation of their sixth amendment rights, but do not offer a theory to support such a claim. The sixth amendment does not guarantee a randomly selected jury. *United States v. Nelson*, 718 F.2d 315, 319 (9th Cir. 1983). Accordingly, this contention is without merit.

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[11]Two Fifth Circuit decisions suggest that this type of decision may be delegated to a court clerk without violating the Constitution. *United States v. Maskeny*, 609 F.2d 183, 193-94 (5th Cir.), *cert. denied*, 447 U.S. 921 (1980); *United States v. Evans*, 526 F.2d 701, 706 (5th Cir.), *cert. denied*, 429 U.S. 818 (1976). We do not reach that issue.

IX

Miscellaneous Assignments of Error

A. *Cross-Examination*

[9] The defendants contend that the district court erred by limiting the scope of the cross-examination. The sixth amendment guarantees a criminal defendant's right to confront adverse witnesses. Nevertheless, "[t]he scope of the cross-examination of a witness is subject to the discretion of the trial court and is reviewable solely for an abuse of that discretion." *United States v. Cutler,* 676 F.2d 1245, 1248 (9th Cir. 1982); *see* Fed. R. Evid. 611(a). The testimony that the defendants sought to obtain on cross-examination was either irrelevant or otherwise inadmissible. We conclude that the district court's actions were correct and within its discretion.

B. *Prosecutorial Vouching*

It is well settled that a prosecutor may not vouch for the credibility of a witness. *See, e.g., United States v. West,* 680 F.2d 652, 655 (9th Cir. 1982). The defendants claim that the Government vouched for the credibility of five of its witnesses. This is incorrect. The statements at issue were of the general form: "Why would [the witness] not tell you the truth?" This did not constitute "vouching." *See United States v. Flake,* 746 F.2d 535, 539-41 (9th Cir. 1984); *United States v. Roberts,* 618 F.2d 530, 533 (9th Cir. 1980), *cert. denied,* 452 U.S. 942 (1981).

C. *Judicial Misconduct*

The defendants contend that the district court violated its duty to act impartially by encouraging the jurors to take notes during complex testimony involving financial data. The defendants also note that the district court told the jury that "another jury of people like you brought in this indictment." They contend that this placed the "prestige and moral persuasiveness" of the Grand Jury behind the indictment. Both arguments are without legal sup-

port. Moreover, the defendants failed to object. *See* Fed. R. Crim. P. 51.

D. *Side-Bar Discussions*

Defendant Utz claims that Judge Henderson conducted over 117 side-bar discussions at which Utz was not present. Utz contends that this practice deprived him of his right to be present at trial. Utz also claims that Judge McNichols refused to conduct side-bar discussions in violation of Federal Rule of Evidence 103(c). Both arguments are without merit. The district court has broad discretion in controlling the conduct of a trial. *See Geders v. United States,* 425 U.S. 80, 86 (1976). The record does not reveal an abuse of discretion.

E. *Rule 16(a)(1)(A)*

Federal Rule of Criminal Procedure 16(a)(1)(A) states that a defendant "corporation, partnership, association or labor union" has the right to discover the testimony of officers and employees before the grand jury. The defendants invoke this right. Rule 16(a)(1)(A), however, does not apply to individuals.

F. *Preindictment Delay*

The defendants argue that preindictment delay caused the loss of several items of evidence. The substance of each item of evidence was introduced through alternative means. Accordingly, the defendants were not prejudiced. *See* Fed. R. Crim. P. 52(a).

G. *Motion to Dismiss for Vindictive Prosecution*

Without explanation, the defendants contend that their motion to dismiss for vindictive prosecution should have been granted. The record does not reveal vindictive prosecution. *See United States v. Heldt,* 745 F.2d 1275, 1280-81 (9th Cir. 1984).

H. *Motion to Disclose Grand Jury Proceedings*

The defendants contend that their motion to disclose grand jury proceedings should have been granted because there was no

threat to the lives of the grand jury witnesses. This argument is irrelevant. Grand jury proceedings may only be disclosed in accordance with Federal Rule of Criminal Procedure 6(e)(3). The record does not reveal an abuse of discretion.

I. *Original FBI Notes*

The defendants argue that the Government violated a court order requiring it to produce original FBI notes. The record does not support this contention. Moreover, the defendants have not shown prejudice. *See* Fed. R. Crim. P. 52(a).

J. *Eyeballing the Jury*

The defendants make the following assertion:

> During every day of trial, two government prosecutors and one FBI agent sat at Plaintiffs [sic] table. Their backs were to the defendants. Their backs and right sides were to the Court. They directly faced the jury from a distance of less than three feet. They eyeballed and smiled at each member of the jury on a minute by minute basis. In time the jury and the prosecution became as one.

The defendants' argument that this constitutes reversible error is without legal support. Moreover, the defendants failed to object at trial.

K. *Constitutionality of the Grand Jury System*

The defendants argue that the grand jury system denies them equal protection because they have no right to a postindictment preliminary hearing. We reject that argument. *See, e.g., United States v. Anderson*, 481 F.2d 685, 691 (4th Cir. 1973), *aff'd*, 417 U.S. 211 (1974).

L. *Effective Assistance of Counsel*

Utz claims that his counsel's failure to call a particular rebuttal witness deprived Utz of effective assistance of counsel. Utz's

claim is inadequate in light of the standards set forth in *Strickland v. Washington*, 104 S. Ct. 2052, 2064 (1984).

M. *Interference with Right to Interview Witnesses*

The defendants claim that the district court barred them from interviewing the Government's witnesses. In fact, the district court merely required counsel to seek the court's permission before interviewing a witness who had already started to testify. The defendants do not allege that they were harmed in any way by that ruling.

X

CONCLUSION

The judgment of the district court is AFFIRMED.

APPENDIX B

United States Court of Appeals
For the Ninth Circuit

Nos. 83-1307, 83-1311
D.C. No. CR-82-629 TEH

United States of America,
Plaintiff-Appellee,

v.

Mark Wellington,
Defendant-Appellant.

United States of America,
Plaintiff-Appellee.

v.

Jerome C. Utz,
Defendant-Appellant.

ORDER

[Filed Mar. 23, 1985]

Before: Merrill, Farris and Beezer, Circuit Judges.

The caption in the opinion filed March 4, 1985, Nos. 83-1307 and 83-1311, is amended to correct defendant-appellant's name from David Wellington to Mark Wellington.

APPENDIX C

United States Court of Appeals
For the Ninth Circuit

CA Nos. 83-1307, 83-1311
DC No. CR-82-629 TEH

United States of America,
Plaintiff-Appellee,

vs.

Mark Wellington,
Defendant-Appellant.

United States of America,
Plaintiff-Appellee,

vs.

Jerome C. Utz,
Defendant-Appellant.

Order

[Filed June 21, 1985]

Before: Merrill, Farris and Beezer, Circuit Judges.

The panel has voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

APPENDIX D

The CONSTITUTION of the UNITED STATES

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

TITLE 28, SECTION 1783

§ 1783. Subpoena of person in foreign country

(a) A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or

to obtain the production of the document or other thing in any other manner.

EXTRADITION TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES

The Government of the United States of America and the Government of the United Mexican States;

Desiring to cooperate more closely in the fight against crime and, to this end, to mutually render better assistance in matters of extradition;

Have agreed as follows:

ARTICLE 1

Obligation To Extradite

1. The Contracting Parties agree to mutually extradite, subject to the provisions of this Treaty, persons who the competent authorities of the requesting Party have charged with an offense or have found guilty of committing an offense, or are wanted by said authorities to complete a judicially pronounced penalty of deprivation of liberty for an offense committed within the territory of the requesting Party.

2. For an offense committed outside the territory of the requesting Party, the requested Party shall grant extradition if:

(*a*) its laws would provide for the punishment of such an offense committed in similar circumstances, or

(*b*) the person sought is a national of the requesting Party, and that Party has jurisdiction under its own laws to try that person.

ARTICLE 2

Extraditable Offenses

1. Extradition shall take place, subject to this Treaty, for wilful acts which fall within any of the clauses of the Appendix

and are punishable in accordance with the laws of both Contracting Parties by deprivation of liberty the maximum of which shall not be less than one year.

2. If extradition is requested for the execution of a sentence, there shall be the additional requirement that the part of the sentence remaining to be served shall not be less than six months.

3. Extradition shall also be granted for wilful acts which, although not being included in the Appendix, are punishable, in accordance with the federal laws of both Contracting Parties, by a deprivation of liberty the maximum of which shall not be less than one year.

4. Subject to the conditons established in paragraphs 1, 2 and 3, extradition shall also be granted:

(*a*) For an attempt to commit an offense; conspiracy to commit an offense; or the participation in the execution of an offense; or

(*b*) When, for the purpose of granting jurisdiction to the United States government, transportation of persons or property, the use of the mail or other means of carrying out interstate or foreign commerce, is also an element of the offense.

FEDERAL RULES OF CRIMINAL PROCEDURE

CHAPTER 7

The Indictment and the Information

Rule 7. The Indictment and the Information.

(a) USE OF INDICTMENT OR INFORMATION. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

* * *

(d) SURPLUSAGE. The court on motion of the defendant may strike surplusage from the indictment or information.

18 U. S. C. 1341

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail acccording to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. Section 2314

2314. Transportation of stolen goods, securities, moneys, fradulent State tax stamps, or articles used in counterfeiting

. . .

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more. . . .

APPENDIX E

United States Court of Appeals
For the Ninth Circuit

CA Nos. 83-1307, 83-1311
DC No. CR-82-629 TEH

United States of America,

Plaintiff-Appellee,

vs.

Mark Wellington,

Defendant-Appellant.

United States of America,

Plaintiff-Appellee,

vs.

Jerome C. Utz,

Defendant-Appellant.

Order

[Filed April 26, 1985]

Before: Merrill, Farris and Beezer, Circuit Judges.

Appellant Utz's motion for permission to file a supplemental petition for rehearing en banc is denied. We grant Utz leave to file a citation of supplemental authority pursuant to Federal Rule of Appellate Procedure 28(j). This citation shall be limited to one page and shall be filed within five (5) days of the filing of this order.

APPENDIX F

Rule 801. Definitions.

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if—

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at the trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) *Admission by party-opponent.* The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

APPENDIX G

In the United State District Court
For the Northern District of California
No. CR 82-0629 TEH

United States of America
Plaintiff,

v.

Mark Wellington,
aka Mark Logan Pedley,
Jerome C. Utz, and
Michael S. Cano,
Defendants.

ORDER
[Filed August 2, 1983]

Defendant Mark Wellington moves to exclude all out-of-court statements by alleged co-schemers admitted by this Court under Fed.R.Evid. 801(d)(2)(E).[1] In the main, the defendant argues that exclusion of the statements is required because 1) the prosecution has failed to satisfy the necessity requirement imposed by the Confrontation Clause of the Sixth Amendment and 2) the government's failure to link each hearsay statement to the particular scheme charged violates Rule 801(d)(2)(E) and exposes the defendant to liability for fraudulent schemes not alleged against him by the grand jury. Defendant's arguments are without merit and, for reasons stated below, the motion is denied in full.

The defendant first claims that the government has offered insufficient proof of hearsay declarant David Wellington's unavailability to satisfy the necessity requirement imposed by the Confrontation Clause of Sixth Amendment. *See United States v. Perez*, 658 F.2d 654, 660-661 (9th Cir. 1981). The defendant's argument is strained. He does not dispute the government's offer of proof that David Wellington is imprisoned in Mexico awaiting

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[1] All later references to rules in this order refer to the Federal Rules of Evidence.

trial for criminal fraud. For the purposes of the Confrontation Clause's rule of necessity, David Wellington's imprisonment in Mexico is insufficient to demonstrate his unavailability and thereby satisfy the Sixth Amendment's strictures.

Second, and principally, the defendant charges that the government's failure to link each hearsay statement to a particular fraudulent scheme violates Rule 801(d)(2)(E) and exposes the defendant to liability for uncharged conspiracies contrary to his rights under the Fifth and Sixth Amendments. *See United States v. Mastelotto*, Nos. 81-1678, 81-1679, slip op. (9th Cir. May 19, 1983). The defendant's elaborately spun argument proceeds from the premise that the defendants are charged with multiple conspiracies. Neither the indictment nor the evidence adduced during the government's case in chief supports this position. To the contrary, the indictment charges each defendant with participation in a multi-faceted, but unified scheme to defraud investors in a speculative home investment program. The proof offered by the government sufficiently supports the government's theory of a single scheme to permit admission of the hearsay statements under Rule 801(d)(2)(E). This Court thus reaffirms its earlier ruling that the government has introduced sufficient evidence of a single fraudulent scheme—independent of the statements themselves—to establish a *prima facie* case of the scheme and of the declarants' and defendants' connection to it. *See United States v. Fleishman*, 684 F.2d 1329, 1337 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 464 (1982).[2]

Accordingly, the defendant's motion to exclude alleged co-schemers' out-of-court statements is hereby DENIED.

DATED: August 2, 1983

/s/ THELTON E. HENDERSON
United States District Judge

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[2] In light of *United States v. Mastelotto*, slip op. at 2311, 2313, however, this Court orders the government to prepare a cautionary jury instruction requiring the jury to find that the defendants participated in the single scheme to defraud alleged by the grand jury in order to convict.